UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

STAY THE COURSE WEST VIRGINIA,
a West Virginia unaffiliated independent
expenditure political action committee;
DAVID BAILEY, in his capacity as Chairman
and Treasurer of Stay the Course West Virginia;
PINEVILLE LUMBER, INC., a West Virginia
Corporation; and THOMAS STEPHEN BAILEY,

Plaintiffs,

v. Civil Action No. 1:12-cv-01658

NATALIE E. TENNANT, in her official capacity
as West Virginia Secretary of State and member
of the West Virginia State Election Commission;
and SCOTT ASH, in his official capacity as the
Prosecuting Attorney for Mercer County, West
Virginia, as a representative of the class of all
West Virginia Prosecuting Attorneys,

Defendants.

PLAINTIFFS' POST HEARING MEMORANDUM

I. INTRODUCTION

This memorandum is submitted in response to the Court's request for supplemental briefing to identify the issues in litigation and discuss whether a preliminary injunction is an adequate remedy to address the chilling effect of the challenged law on Plaintiffs' First Amendment rights to free speech.

II. ISSUES IN LITIGATION

The parties have been unable to agree upon a set of stipulations so as to narrow the contested issues. Plaintiffs' counsel submitted to counsel for the Secretary of State ("Tennant") the following proposed stipulations:

PROPOSED STIPULATION NO. 1:

Plaintiffs withdraw their allegations regarding certain "policy" statements found on the Secretary of State's website. (*See* Complaint (Doc. 1) at ¶¶ 21, 23, 24, 35, and 57.) The Parties stipulate that these statements are for public information purposes only, and are not intended as statements of policy.

BASIS FOR STIPULATION NO.1:

Tennant explained in her Answer that the statements complained of by the Plaintiffs "are provided as information for the public and not intended as statements of policy. At times, these materials have been corrected as inaccuracies have been discovered. If these materials should be deemed to contain incorrect statements, they may be withdrawn, or corrected and republished as needed." (Tennant Answer (Doc. 11) at ¶ 21.) Tennant also acknowledged that several sections of the West Virginia Code of State Rules are unenforceable "under state law and, therefore, no determination of constitutional validity is necessary." (Answer at ¶¶ 38-40.)

PROPOSED STIPULATION NO. 2:

The Parties stipulate that to the extent any statements or other information provided to the public on the Secretary of State's website is inconsistent with the law stated in the West Virginia Code, it is the West Virginia Code and relevant case law that shall control and have priority over the Secretary's website.

BASIS FOR STIPULATION NO. 2:

See above, Basis for Stipulation No. 1.

PROPOSED STIPULATION NO. 3:

The Parties stipulate that W. Va. Code §§ 3-8-8(a) and (b) (2011) were amended and rewritten in 2010 so as to, *inter alia*, (i) expressly prohibit corporate contributions to any candidate or candidate's campaign; (ii) exclude prior language that prohibited corporate contributions to "a political committee" or "other persons" for any election expense; and (iii) prohibit the solicitation or receipt of corporate contributions by any candidate or candidate's committee.

BASIS FOR STIPULATION NO. 3:

Tennant has admitted that W. Va. Code § 3-8-8 was rewritten by the West Virginia Legislature in 2010 and that the newly promulgated § 3-8-8 does not include the prior prohibition of corporate contributions to any "political committee or other person for the payment of any primary or other election expense whatever"; and that the new § 3-8-8 prohibits corporate contributions ***only*** to candidates or candidate's campaign. (*See* Answer at ¶¶ 18, 19.)

PROPOSED STIPULATION NO. 4:

The Parties stipulate that as a result of the 2010 amendments to § 3-8-8(a) and (b), and considering the plain language of the statute and the legal maxim *expressio unius est exclusio alterius*, (i) corporations are now permitted to make contributions to independent expenditure political action committees ("IEPACs") and (ii) IEPACs are no longer prohibited from soliciting or receiving corporate contributions.

BASIS FOR STIPULATION NO. 4:

See above basis for Stipulation No. 3. Additionally, the Secretary of State's website acknowledges that corporations are permitted to make direct contributions to IEPACs. (*See* attached EXHIBIT 1; *see also Ctr. for Individual Freedom, Inc. v. Tennant*, Nos. 1:08-cv-00190 & 1:08-cv-01133, 2011 WL 2912735, *1, *6 (S.D. W.Va. July 18, 2011).)

PROPOSED STIPULATION NO. 5:

The Parties stipulate that the current West Virginia Legislative Rules applicable to corporate political activity prohibit corporations from making any political contributions and prohibit all political committees from accepting corporate contributions, W.Va. C.S.R. §§ 146-1-3.1 and -3.2 and 146-1-6.2 (2008); and the Parties stipulate that these legislative rules are no longer valid to the extent they contradict or are otherwise inconsistent with W. Va. Code § 3-8-8 (2011) and any other relevant provision of the West Virginia Code.

BASIS FOR STIPULATION NO. 5:

Tennant has admitted that W. Va. C.S.R. §§ 146-1-3.1 and -3.2 and 146-1-6.2 (2008) are unenforceable under state law (*i.e.,* the newly promulgated W. Va. Code §§ 3-8-8(a) and (b)). (*See* Answer at ¶¶ 20, 38, 39.)

PROPOSED STIPULATION NO. 6:

The Parties stipulate that corporations are now permitted to make unlimited independent expenditures because (i) the United States Supreme Court has so held in the *Citizens United* case; (ii) corporations are included in the definition of "***person***" at W. Va. Code § 3-8-1a(18) (2011); (iii) W. Va. Code § 3-8-1a(15) provides that an independent expenditure is an expenditure made by any "***person***" that expressly advocates the election or defeat of a clearly identified candidate and is not made in concert or cooperation with or at the request or suggestion of the candidate, the candidate's agents, the candidate's authorized committee or a political party committee or its agents; and (iv) W. Va. Code § 3-8-2(b)(1) requires that any "***person***" making independent expenditures in excess of $1,000 must file certain financial disclosure forms with the West Virginia Secretary of State, which must disclosure the principal place of business of the partnership, "***corporation***," committee, association, organization or group that made the expenditure.

BASIS FOR STIPULATION NO. 6:

The principal reason for this proposed stipulation is the Supreme Court's holding in the *Citizens United* case. *See* 130 S.Ct. at 909 ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.") Additionally, the plain meaning of the language of W.Va. Code §§ 3-8-1a(15), (18), and 3-8-2(b)(1) provides that corporations can make independent expenditures.

PROPOSED STIPULATION NO. 7:

The Parties stipulate that the only contested issues in this civil action are (i) whether W. Va. Code § 3-8-8(f) (2011) violates the free speech provision of the First Amendment of the Constitution of the United States of America to the extent said statute prohibits any person, as "person" is defined at W. Va. Code § 3-8-1a(18) (2011), from contributing more than $1,000 per election to IEPACs, (ii) whether W. Va. Code § 3-8-8(g) (2011) violates the free speech provision of the First Amendment of the Constitution of the United States of America to the extent said statute prohibits IEPACs from accepting contributions of more than $1,000 per person per election, and (iii) whether W. Va. C.S.R. § 146-3-5.2 (2008) violates the free speech provision of the First Amendment of the Constitution of the United States of America to the extent said rule prohibits any person, as "person" is defined at W. Va. Code § 3-8-1a(18) (2011), from contributing more than $1,000 per election to IEPACs.

BASIS FOR STIPULATION NO. 7:

See above Bases for Stipulation Nos. 1-6. Additionally, Plaintiffs asserted in their Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction that "the only contested issue remaining in this matter is whether the $1,000 per person per election limit on political contributions is unconstitutional as applied to independent expenditure political action committees." (Doc. 16 at 3-4.) Tennant did not take issue with this assertion in her Response to Plaintiffs' Motion for Preliminary Injunction (Doc. 20) or her Memorandum in Opposition to Preliminary Injunction (Doc. 21).

PROPOSED STIPULATION NO. 8:

The Parties stipulate that time is of the essence regarding this Court's resolution of the issues presented.

BASIS FOR STIPULATION NO. 8:

Tennant admitted to ¶ 50 of the Complaint, which states that "[t]ime is of the essence regarding this Court's resolution of the issues presented by this civil action because there is a very limited time frame for the committee to raise money for its 2012 independent expenditures . . . ."

For the reasons set forth in the above-stated Bases for Stipulations, Plaintiffs' respectfully request that the Court adopt the proposed stipulations.

III. PRELIMINARY INJUNCTION IS AN INADEQUATE REMEDY

A preliminary injunction is an inadequate remedy in this case because (i) it is unclear whether a preliminary injunction provides the Plaintiffs with any protection from prosecution under the challenged laws for acts that occur while the injunction is in place in the event the preliminary injunction order is reversed or a permanent injunction is not issued; and (ii) a preliminary injunction will not be enforceable against any of the 54 West Virginia prosecuting attorneys who are not a party to this lawsuit.

A. The Immunity Issue:

It is not clear whether a preliminary injunction bestows upon the protected class immunity from prosecution for acts that violate a challenged statute that are performed while the injunction is in place in the event the injunction order is reversed on appeal or the injunction is lifted and a permanent injunction is not issued. *See American Civil Liberties Union v. Reno*, 31 F. Supp.2d 473, 499 n. 7 (E.D. Pa. 1999). The *Reno* decision defines this issue by referring to the differing opinions expressed by Justices John Paul Stevens and Thurgood Marshall in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). 31 F. Supp.2d at 499 n. 7 *(quoting* 457 U.S. at 647 (Stevens, J. concurring) (asserting that federal judges lack the authority to enjoin later state prosecution under a state statute) and 457 U.S. at 655 (Marshall, J., dissenting) (asserting that federal judges have the power to issue a preliminary injunction that provides permanent protection from penalties for statutory violations that occur when a preliminary injunction is in effect)).

The *Reno* decision states that "granting injunctive relief to the plaintiffs . . . that only immunizes them for prosecution during the pendency of the injunction, but leaves them open to potential prosecution later if the [injunction] is reversed, would be hollow relief indeed for plaintiffs and members of the public similarly situated." *Id.* Therefore, the *Reno* court granted a preliminary injunction that enjoined the defendant "from enforcing or prosecuting matters premised upon [the challenged statute] at any time for any conduct that occurs while this Order is in effect." *Id.* at 499.[1]

The question regarding the extent of protection provided by a preliminary injunction is still unsettled. *See* Vikram David Amar, *How Much Protection Do Injunctions Against Enforcement Of Allegedly Unconstitutional Statutes Provide?*, 31 FORDHAM URB. L.J. 637 (2003).

B. The Persons Bound Issue:

Even if this Court were to issue a preliminary injunction enjoining the enforcement of the $1,000 contribution limit as to independent expenditure political action committees ("IEPACs"), the Plaintiffs would ***not*** be relieved of the chilling effect of the challenged laws upon their right to free speech.

Rule 65(d)(2) of the Federal Rules of Civil Procedure provides that the only parties bound by a preliminary injunction are the actual parties to the litigation; the parties' officers, agents, servants, employees, and attorneys; and "other persons who

[1] It is not clear how someone can be "***preliminarily*** enjoined" from prosecuting someone "at any time," as ordered in *Reno*.

are in active concert or participation with" the parties or their officers, agents, servants, employees, or attorneys.

> The Tenth Circuit has interpreted the phrase 'persons who are in active concert or participation' to mean those otherwise bound by the order or encompassing arrangements 'akin to alter ego, collusion, or identity of interest between a party and a nonparty' as well as 'those situations where a nonparty with actual notice aids or abets a named defendant or his privy in violating the order.'

United States v. Scott, No. 11-CV-01430, 2012 WL 224500, *2 (D. Colo. Jan. 25, 2012) (*quoting Reliance Ins. Co. v. Mast Constr. Co.*, 84 F.3d 372, 377 (10th Cir. 1996) (interpreting similar language in the 1996 version of Rule 65 as it applied to temporary restraining orders)); *see also Indep. Fed'n of Flight Attendants v. Cooper*, 134 F.3d 917, 920 (8th Cir. 1998) ("The 'essence' of this rule 'is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding'") (*quoting Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945)).

C. Conclusion:

The only parties who will be bound by a preliminary injunction in the case at bar will be the named Defendants and their employees, agents, and attorneys. The 54 West Virginia prosecuting attorneys that are not named as defendants will not be bound unless the Court was to certify a class consisting of all 55 West Virginia prosecuting attorneys ***before*** issuing a preliminary injunction. Considering the nonparticipation of Defendant Ash, who was sued as the class representative, and that there is only 92 days until the general election, it is impractical to delay judicial action to redress Plaintiffs' injuries until a class can be properly certified. The Plaintiffs' can be granted the relief they seek if the Court issues a declaratory judgment finding, as a matter of law, that the challenged laws are unconstitutionally broad as applied to IEPACs.

The record of this case will support the immediate issuance of a declaratory judgment. In fact, it is in the best interest of judicial fairness that the chilling effect of the challenged laws upon the Plaintiffs' rights to free speech be lifted by an immediate declaration that such laws are unconstitutionally broad as a matter of law as applied to independent expenditure political action committees. The Plaintiffs, therefore, have submitted concurrent with this memorandum a Motion for Declaratory Judgment and supporting Memorandum.

Date: August 6, 2012

STAY THE COURSE WEST VIRGINIA,
DAVID BAILEY, PINEVILLE LUMBER,
INC., and THOMAS STEPHEN BAILEY,

By Counsel

/s/ Allen R. Prunty

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Prosecuting Attorney for Mercer County, West
Virginia, as a representative of the class of all
West Virginia Prosecuting Attorneys,

Defendants.

CERTIFICATE OF SERVICE

I, Allen R. Prunty, counsel for the Plaintiffs, do hereby certify that on this 6th day of August, 2012, I electronically filed the foregoing *Plaintiffs' Post Hearing Memorandum* with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Doren Burrell, Esquire
Senior Assistant Attorney General
Office of the Attorney General
State Capitol Complex
Building 1, Room E-26
Charleston, West Virginia 25305
Counsel for the WV Secretary of State

And I certify that on this 6th day of August, 2012, I served the foregoing *Plaintiffs' Post Hearing Memorandum* upon the following by regular U.S. Mail, postage fully paid:

Scott Ash, Esquire
Mercer County Prosecuting Attorney
120 Scott Street, Suite 200
Princeton, West Virginia 24740

/s/ Allen R. Prunty
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